Supreme Court, U.S.
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Case No. 03-1488

In The

Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ of Certiorari To The Court of Appeal of the State of California, Second Appellate District, Division One

BRIEF AMICI CURIAE OF HISTORIANS ALFRED L. BROPHY, PAUL FINKELMAN, KERMIT L. HALL, MICHAEL I. MEYERSON AND STEPHEN A. SIEGEL IN SUPPORT OF PETITIONERS

MICHAEL I. MEYERSON,
Counsel of Record
UNIVERSITY OF BALTIMORE SCHOOL OF LAW
1420 N. Charles Street
Baltimore, MD 21201
(410) 837-4550

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. AT THE TIME OF THE AMERICAN REVOLUTION, FREEDOM OF THE PRESS WAS UNDERSTOOD IN ENGLAND TO PROHIBIT INJUNCTIONS AS A REMEDY IN DEFAMATION ACTIONS	4
A. *The Development of the Ban on Licensing Printing*	4
B. *The Development of the Refusal to Enjoin Defamatory Statements*	10
C. *The General Understanding In England In 1776 Was That The Prohibition Of Prior Restraints Barred Review By Both Judges And Censors*.....	17
II. THE DEVELOPMENT OF THE PRIOR RESTRAINT DOCTRINE IN AMERICA	21
A. *The Road To The First Amendment*	21
B. *Lessons of the Alien and Sedition Act*	27

C. *Early Judicial Recognition That Injunctions Against Defamation Constitute An Impermissible Prior Restraints*.. 29

III. THE CONTINUING NEED FOR THE PRIOR RESTRAINT DOCTRINE 40

A. *Restraining The Censor* 40

B. *Personalization And Equal Protection* 42

C. *The Collateral Bar Rule And The Cost of Delay* 43

D. *Abstract Facts And Speculative Harms* 44

E. *Aesthetics And Prior Restraints*.....45

F. *The Framers' Intent And The Benefits Of An Easy Case* ... 46

CONCLUSION 49

APPENDIX 50

TABLE OF AUTHORITIES

Page

CASES

Allegretti Chocolate Cream Co. v. Rubel, 83 Ill. App. 558 (1899) 38

Balliet v. Cassidy, 104 F. 704, 706 (C.C.D.Or. 1900)..... 36

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Brandreth v. Lance. 8 Paige Ch. 24, 26 (N.Y. 1839) 30,31

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Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804 (Mo. 1892) 38

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INTEREST OF THE AMICI CURIAE[1]

Amici are professors and scholars who teach and write about American and English legal history and are knowledgeable about the history of the freedom of the press in America. They are Alfred L. Brophy, Paul Finkelman, Kermit L. Hall, Michael I. Meyerson, and Stephen Siegel. A summary of the qualifications and affiliations of the individual amici is provided in the appendix to this brief. Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Cochran v. Tory*, 2003 Cal. App. Unpub. LEXIS 10227, B159437 (Cal. Ct App. 2nd App. Dist.) (2003), petition for review denied 2004 Cal. LEXIS 751 (Cal. 2004), the court imposed an extraordinary remedy in a defamation action: A speaker, Ulysses Tory, was permanently enjoined from ever discussing his former attorney, Johnnie Cochran, in public. The relevant part of the

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have filed blanket consent to the filing of amici briefs. Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the amici curiae or their counsel, has made a monetary contribution to the preparation or submission of this brief.

> [i]n any public forum, including, but not limited to, the Los Angeles Superior Court and any other place at which Cochran appears for the purpose of practicing law: (i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm.... Joint Appendix (J.A.) 56.

The only Supreme Court case directly addressing the issue of enjoining defamatory statements, *Near v Minnesota*, 283 U.S. 697, 701 (1931), held that a statute permitting an injunction against further publication of a "malicious, scandalous and defamatory newspaper" was an unconstitutional prior restraint. Although that decision provided only a brief historical summary to support its holding, a detailed historical study reveals that the Court's analysis was indeed correct.

Amici, as legal historians, believe they can serve the Court by exploring the history of the prior restraint doctrine in both England and the United States, and showing that the use of injunctions as a remedy in defamation actions, such as that imposed on Ulysses Tory, violates the principles of the freedom of expression as understood in England prior to the American

Revolution, in America at the time of the drafting of the First Amendment, and throughout American history. In fact, by the second half of the Eighteenth Century, there was a consensus in both England and America that a ban on enjoining defamatory speech was an essential component of freedom of expression. Such injunctions were seen as one type of improper "prior restraint".

The development of the doctrine of prior restraint can best be understood as a product of four distinct strands: 1) the history of licensing of the press; 2) the historical prohibition on enjoining defamatory statements; 3) the English and colonial distrust of judges; and 4) American development of the English and Colonial traditions. Together, they created the foundation for much of our understanding of the meaning of freedom of speech and of the press.

ARGUMENT

I.

AT THE TIME OF THE AMERICAN REVOLUTION, FREEDOM OF THE PRESS WAS UNDERSTOOD IN ENGLAND TO PROHIBIT INJUNCTIONS AS A REMEDY IN DEFAMATION ACTIONS

A. The Development of the Ban on Licensing Printing

In 1530, King Henry VIII issued a proclamation, mandating that no religious book be printed until it had first been "examyned and approued by the ordinary of the diocese." Fred S. Siebert, Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control 46 (1965). In 1538, a new proclamation was issued, Proclamation Antiquity 2 (97), which instituted the first comprehensive licensing system. *Id.* at 48-49. Religious books were still to be licensed by bishops, but all others needed the approval of members of King Henry VIII's Privy Council. The penalty for unauthorized publication included loss of property, fine, or imprisonment.

While the licensing law was revised in 1546 and in 1559, the next major step in the regulation of printing occurred in 1586,

when that emblem of oppression, the Star Chamber, issued a decree which regulated every aspect of printing. *Id.* at 68-74. All printers were required to register their presses with the Stationers Company, the royally-authorized organization of printers and writers, and receive a license prior to the publication of any work. The number of printers was strictly limited, and violators of Stationers Company rules could face both a fine and destruction of their printing.

A second Star Chamber decree, in 1637, reiterated and expanded the licensing requirement. The difficulty of enforcing these requirements was bemoaned by the Star Chamber itself, which stated that:

> divers abuses have . . . beene practised by the craft and malice of wicked and evill disposed persons, to the prejudice of the publike; And divers libellous, seditious, and mutinous bookes have beene unduly printed, and other bookes and papers without licence, to the disturbance of the peace of the Church and State. *Star Chamber Decree of 1637, reprinted in* 2 Complete Prose Works of John Milton 793 (1959).

The end of the unpopular Star Chamber, which occurred on July 5, 1641, did not mean the end to restraints on the press. On

June 14, 1643, a new licensing law was enacted. This time, it was the Parliament that was to serve as censor. In its order, Parliament noted "the great late abuses and frequent disorders in Printing many false forged, scandalous, seditious, libellous, and unlicensed Papers, Pamphlets, and Books to the great defamation of Religion and government." Licensing Order of June 14, 1643, *reprinted in* 2 Complete Prose Works of John Milton 797 (1959). Under Parliament's new order, all books and pamphlets had to be approved by licensors appointed by either the House of Commons or the House of Lords.

At about this time, intellectuals began to expound on the need for freedom from prior review as an indispensable ingredient for a free society and a free press. In 1644, John Milton published *Areopagitica*, *reprinted in* 2 Complete Prose Works of John Milton at 485-570 (1959). Milton was willing to concede that if printers published scandalous or seditious work, the Government should "confine, imprison, and do sharpest justice on them as malefactors." But, licensing, according to Milton, created a special and intolerable harm by preventing books from being published at all. Prior to the imposition of licensing:

> [b]ooks were ever as freely admitted into the World as any other birth; the issue of the brain was no more stifl'd then the issue of the womb . . . if it prov'd a Monster, who denies, but that it was justly burnt, or sunk into the Sea. But that a Book in wors condition then a peccant soul, should be to stand before a Jury ere it be borne to the World, and undergo yet in darknesse the judgement of *Radamanth* and his Collegues [the mythical judges of Hades], ere it can passe the ferry backward into light, was never heard before ....

Another aspect of licensing that haunted Milton was his view that prior suppression of a work robbed humanity of its ideas for all time. Milton said, "who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye[,] . . . slaies an immortality rather then a life."

In spite of such arguments, licensing continued for most of the Seventeenth Century. New laws were passed in 1647 and 1662. *See* James Paterson, The Liberty of the Press, Speech, and Public Worship 45-46 (1880). In 1679, the licensing statute expired, but English judges ruled that the Crown could license publications even without statutory authority. In a 1680 trial for the crime of publishing a weekly newspaper without a license, the recorder for

the court, George Jeffreys, stated that, "it is the opinion of all the judges of England that it is the law of the land, that no person should offer to expose to public knowledge any thing that concerns the government, without the king's immediate license." *The Trial of Henry Carr, or Care, at the Guildhall of London, For a Libel: 32 Charles II. A.D. 1680, in* 7 Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time 1111, 1115 (1810).

Parliament, however, was not content to rely on such judicial reasoning, and passed licensing acts in 1685 and again in 1692. The 1692 Act expired by its own terms in 1695. Although the House of Lords voted to renew the law, the House of Commons refused. The reasons given for permitting the licensing law to lapse were far more practical than philosophical. *See* H.L. JOUR., XV, 545-46 (April 18, 1695). The House of Commons complained that, while the Licensing Act banned "offensive" works, it supplied no test for offensiveness. Moreover, because the Act did not specify the penalty for violations, judges were free to impose arbitrary and excessive penalties. There were also

complaints that the licensing system was ineffective in stopping scurrilous books, that poorly paid licensors were frequently bribed, and that the special privileges and protections of law were granted to a favored few. Interestingly, the House of Commons did not argue that the press should be free to criticize the Government, or even that licensing was destructive of freedom. In the words of British historian Lord T.B. Macaulay, "on the great question of principle, on the question whether liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said." T.B. Macaulay, III, History of England 328 (1906).

Nonetheless, the expiration of the Licensing Act quickly became viewed as a monumental victory for freedom of the press. In 1701, Daniel Defoe described the "tyranny of a Licenser" as one of the great burdens ever to have been imposed on the press, and credited the English Government with the wisdom to end this evil:

> This, in all Ages, has been a method so ill, so arbitrary and so subjected to bribery and Parties, that the Government has thought fit, in justice to the Learned Part of the World, not to suffer it; since it has always been shutting up the Press to one side, and opening it to the other; which, as Affairs are in

> England often changing, has, in its turn, been oppressive to both. Daniel Defoe, "The True Born Englishman" (1703), *reprinted in* Later Stuart Tracts 110 (1964).

B. The Development of the Refusal to Enjoin Defamatory Statements

A similar evolution in understanding occurred in England concerning the rule that libel and slander were offenses that could only be punished, but could not be prevented. By the time of the American Revolution, it was generally understood that this rule was an essential element in preserving freedom of expression. *See generally* Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 308-312 (2001).

There were several different roots to the English law of defamation. During the Thirteenth and Fourteenth Centuries, defamatory statements generally were considered to be matters for religious tribunals, and the ecclesiastical courts heard many cases involving imputations of crimes and sexual immorality. *See, e.g.*,

R.C. Donnelly, *History of Defamation*, 1949 Wis. L. Rev. 99, 100-03. Eventually, though, the Star Chamber took over the trial of cases involving libel. Early in the 1600s, the Star Chamber declared that libel was a criminal offense because it tended to cause breaches of the peace, and if the libel was "against a magistrate, or other public person, it is a greater offence." Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546, 565 (1903) (quoting De Libellis Famois, 5 Co. Rep. 125 (1606)). The Star Chamber's penalties for those found guilty of libel were harsh:

> [A] libeller shall be punished either by indictment at the common law, or by bill, if he deny it, or *ore tenus* on his confession in the Star Chamber, and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant, by pillory and loss of his ears . . . .

There was no possible protection from a jury of one's peers. The Star Chamber ruled alone on both questions of law and fact. *See, e.g.*, 2 James Fitzjames Stephen, A History of the Criminal Law of England 308-09 (1883).

At the same time, the common-law courts were wresting

jurisdiction away from the ecclesiastical courts and claiming jurisdiction over defamations which caused "temporal damages." William L. Prosser, *Libel Per Quod*, 46 Va. L. Rev. 839, 841 (1960). Thus, private persons who wanted to obtain damages for a defamatory statement turned to the common-law courts. Because the Star Chamber heard claims of criminal libel and printed defamation, the common-law courts were left mostly with spoken private defamation.

When the Star Chamber was abolished in 1641, the common-law courts assumed jurisdiction over all forms of defamation, though the rules governing the different forms of defamation were never well-integrated. In 1670, the distinction between libel, or written defamation, and slander, which is spoken, was formalized. *See The King v. Lake, Hardes* 470 (1670).

The courts of equity, accordingly, were denied authority to hear claims for defamation. As early as 1742, it was ruled in the *St. James's Evening Post Case*, that the courts of equity had no jurisdiction over claims of libel and slander: "For whether it is a libel against the publick or private persons, the only method is to proceed at law." *Roach v. Garvan*, 26 Eng. Rep. 683, 683 (1742).

Since the common-law courts then had no power to grant injunctions, the resultant ruling meant that defamation could not be enjoined; the only permissible remedy was money damages at law.

Eventually, the unavailability of injunctive relief for defamation came to be considered an integral part of a free press. While a few cases implied that equity could, in fact, enjoin a libelous publication, these cases were quickly dismissed as aberrational throwbacks to the tyrannical censorship of the Star Chamber. For example, it was reported that the very contention that injunctions could be granted to prevent libel "excited great astonishment in the minds of all the practitioners of the courts of equity." Note to *Horne's Case* (1777), in 20 A Complete Collection of State Trials 799 (Thomas Howell ed. 1816). According to the editor of *Horne's Case*, this surprise was due to the fact that: "[T]here is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference or analogy...."

The 1848 case of *Clark v. Freeman,* 11 Beav. 112 (1848) (Lord Langdale, Master of Rolls), announced a similar linkage of

the concept of enjoining libels to the censorial practices of the past. In rejecting a plea to enjoin the publication of defamatory statements that alleged that a physician to the Queen, "is somehow concerned in vending quack medicines," the judge stated, "I am afraid that if I were to interfere as is now asked, I should be reviving the criminal jurisdiction of the Star Chamber."

A related development in the concept of prior restraint was the growing consensus in England that judges were a potential source of oppression. For example, one of the major Eighteenth Century battles for freedom of the press in England was to give jurors, rather than judges, the power to determine whether publications were in fact defamatory. Previously, jurors had been limited to the question of whether the defendant published the material.

The most notorious case of penalizing independent-minded jurors involved the 1670 English trial of William Penn, later the founder and first Governor of Pennsylvania. Catherine Owens Peare, William Penn, A Biography 106-22 (1956). Penn had been charged with violating the Conventicle Act, which prohibited the exercise of religion "in other manner than according to the liturgy

of the Church of England." During Penn's trial, the court told the jury to ignore the defendant's plea for acquittal based on freedom of conscience. From the bale-dock, Penn cried out, "I appeal to the jury, who are my judges, and this great assembly, whether the proceedings of the court are not most arbitrary, and void of all law, in offering to give the jury their charge in the absence of the prisoners."

The jury refused to hand down a guilty verdict. The Recorder responded to the jury:

> Gentlemen, . . . you shall not be dismissed, till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire and tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God, or you shall starve for it.

All twelve members of the jury were fined and sent to Newgate prison until they paid. Eight paid rather quickly, but four refused and stayed in prison for several months. Finally, the Court of Common Pleas ruled that jurors could not be penalized for such conduct: "It is absurd, a jury should be fined by the judge for going against their evidence ...."

In 1687, William Penn, while in Pennsylvania, published a

tract entitled, *Excellent Privileges of Property and Liberty, Being the Birth-Right of the Free-Born Subjects of England,* excerpted in 1 The Founders' Constitution 431, 432 (P. Kurland & R. Lerner, eds., 1987). Penn declared that the right to a jury trial was one of the "grand pillars of English liberty, … whereby we have been, and are preserved more free and happy than any other people in the world, and (we trust) shall ever continue so:" *See generally* Alfred L. Brophy, *For the Preservation of the King's Peace and Justice': Community and English Law in Sussex County, Pennsylvania, 1682-1696*, 40 Am. J. Legal Hist. 167 (1996)(discussing how colonists in Pennsylvania worked to limit the power of judges).

More than a century later, American colonists would recite Penn's case as an example of the need for juries to protect liberty against the overreaching of the Crown's judges. One colonial writer analogized Penn's case to colonial trials for seditious libels, where juries were denied the right to determine the validity of printed complaints against the government. The obvious lesson for colonial libertarians was that juries were forever to be viewed as a "Bulwark of Saftey against Pride, Insolence and Partiality of Power." William Smith, *Letter to Printer*, N.Y Gazette; or Wkly.

Post-Boy, Mar. 19, 1770, at number 1420.

The principle behind trusting jurors rather than judges in cases involving libel was explained by Lord Camden in 1792:

> Who shall have the care of the liberty of the press--the judges or the people of England? The jury are the people of England. The judges are independent men! Be it so. But are they totally beyond the possibility of corruption from the Crown? Is it impossible to show them favour in any way whatever? The truth is, they possibly may be corrupted--juries never can! What would be the effect of giving judges the whole control of the press? Nothing would appear that could be disagreeable to the Government." (quoted in John Campbell, Lives of the Lord Chancellors and Keepers of the Great Seal of England. (5th Ed. Vol VII 1868)).

Judges were not seen as the protectors of freedom of the press. Rather, they were seen as one more governmental entity that must not be given power over the press.

C. *The General Understanding In England In 1776 Was That The Prohibition Of Prior Restraints Barred Review By Both Judges And Censors.*

At the time of the American Revolution, a consensus had developed in England that liberty of the press meant that no judicial orders could prevent what could be written for the future

and no administrative licensor or censor could preview work prior to publication. Freedom required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal.

This background provides context for Sir William Blackstone's famous description of liberty of the press. In his *Commentaries on the Laws of England*, Blackstone described why punishment for libels was consistent with liberty of the press:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.4 W. Blackstone, Commentaries *151-*152 (1769).

Although this statement indicates the general English opposition to "previous restraints," it does not actually say what constitutes such a restraint. Blackstone merely contrasts previous restraints with punishments that are imposed after someone "publishes what is improper, mischievous, or illegal." Significantly, Blackstone's description of the remedy for a libel

omits any reference to preventive relief: "The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender." *Id.* at *151.

We must turn elsewhere for a fuller description of what was encompassed by the term "previous restraint." In 1775, on the dawn of the American Revolution, Jean DeLolme wrote his work, The Constitution of England (John MacGregor ed. 1853) (1775). DeLolme was a Swiss author whose description of the English government, while largely unknown to 20th Century Americans, was well-known and well-respected by Americans at the start of the Republic. John Adams referred to DeLolme's books as "the best defence of the political balance of three powers that ever was Written." Gordon S. Wood, The Creation of the American Republic 575 (1969). DeLolme's book was also cited by America's Blackstone, St. George Tucker; *See* St. George Tucker, Blackstone's Commentaries 1 app. at 298-99 (1803), and Justice Joseph Story, *See* 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1878-79, at 735-37 (1833).

DeLolme's description of liberty of the press in England stressed that such liberty meant freedom from all previous restraint, whether from the judicial branch or from licensors: "Liberty of the press consists in this: that neither courts of justice, nor any judges whatever, are authorized to take notice of writings intended for the press; but are confined to those which are actually printed." The Constitution of England at 119.

At the time of the drafting of the First Amendment, therefore, the English understanding of a free press meant, at a minimum, that neither judges nor administrators were to take notice of writings intended for the press. Battles over the permissibility of subsequent punishments persisted over the next two hundred years. But even in a repressive environment that permitted punishment for truthful criticism of the Government, one element of liberty of the press was well-understood: No governmental official--not judge, not censor, not licensor--should be involved in restricting expression before it is communicated.

II.

THE DEVELOPMENT OF THE PRIOR RESTRAINT DOCTRINE IN AMERICA

A. The Road To The First Amendment

In the American colonies, the concept of freedom of the press followed a path similar to that in England. The colonial experience taught that assaults on liberty of the press could come from any of the three branches of government: the legislative, executive, or judicial.

During the Seventeenth Century, colonial governments followed the English example and used licensing laws to restrict printed material. For example, in 1682, John Bucknew of Virginia was imprisoned for printing without governmental authority. Walter Brasch & Dana Ulloth, The Press and the State 50 (1986).

In 1723, the Massachusetts House of Representatives, angry at the criticism published by Benjamin Franklin's older brother, James Franklin, in the *The New-England Courant* barred him from further printing without governmental approval. With

James Franklin in hiding, the *Courant,* published the following anonymous open letter pleading for the use of jury proceedings, rather than summary governmental action:

> The end of Humane Law is to fix the boundaries within which Men ought to keep themselves; But if any are so hardy and presumptuous as to break through them, doubtless they deserve punishment. Now if this *Printer* had transgress'd any Law, he ought to have been presented by a Grand Jury, and a fair tryal brought on. NEW ENG. COURANT, No. 79, Jan. 28-Feb. 4, 1723.

Other colonists realized the danger posed by the requirement of prior review of newspapers. Pennsylvania's only newspaper, the *American Weekly Mercury*, ended an attack on the treatment of James Franklin with the following fictitious caustic item: "By private Letters from Boston we are informed, that Bakers there are under great Apprehension of being forbid baking any more Bread, unless they will submit to the Secretary as Supervisor General and Weigher of the Dough, before it is baked into Bread, and offered to Sale."AMERICAN WKLY. MERCURY, Feb. 26, 1723.

The trial of John Peter Zenger in 1735 highlighted the colonial distrust of judicial oversight of the press. Zenger's

newspaper, the *New York Weekly Journal*, had published criticism of government officials, and Zenger was put on trial for seditious libel . The judge in the case, Chief Justice James DeLancey, ruled that under English common law the truth was not a defense, n161 and it was for the judge, not the jury, to determine if a printed statement "make a Lybel" against the government. *See* Freedom of the Press from Zenger to Jefferson 60 (Leonard W. Levy ed., 1966). Zenger's attorney, Andrew Hamilton, conceded that Zenger had published the material, but argued both that the making of a truthful charge should not be a crime and that the jury, not the judge, should decide whether a statement is libelous. *Id.* at 44-51. He explained his distrust of judges deciding the fate of those who complain against the government:

> I think it will be agreed, That ever since the Time of the Star Chamber, where the most arbitrary and destructive Judgments and Opinions were given, that ever an *Englishman* heard of, at least in his own Country: I say, Prosecutions for Libels since the Time of that arbitrary Court . . . have generally been set on Foot at the Instance of the Crown or its Ministers; and . . . these Prosecutions were too often and too much countenanced by the Judges, who held their Places at Pleasure, (a disagreeable Tenure to any Officer, but a dangerous one in the Case of a Judge.) *Id.* at 55.

Hamilton argued that existing law not only presented a danger by giving too much power to judges, it weakened the protection of the innocent by depriving juries of the right to make the critical determination on the criminality of a publication. Finally, he pleaded directly to the jury "as Men who have baffled the Attempt of Tyranny." *Id.* at 59. Despite the judge's instructions to ignore Hamilton's argument, the jury returned a verdict of not guilty, "upon which there were three Huzzas in the Hall which was crowded with people." *Id.* at 61.

It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges. One colonial writer described the principle that there be no conviction without a jury verdict as "the glorious Security thereby given for Freedom in writing and speaking." William Smith, *Letter to Printer*, N.Y. GAZETTE; OR WKLY. POST-BOY, Mar. 19, 1770, at number 1420.

Liberty in America was seen as protection *from*, not by, colonial judges. In the Declaration of Independence, Thomas Jefferson included the symbiotic relationship between the judiciary

and the King in the list of grievances: "He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." By the time of the Revolution, Americans were well aware that their liberty, especially their liberty of the press, could be attacked by all branches of government.

One of the earliest comprehensive definitions of liberty of the press came from James Wilson at the Pennsylvania state convention ratifying the Constitution. On December 1, 1787, Wilson, who was later to serve as a Justice on the first United States Supreme Court, declared:

> The idea of the liberty of the press, is not carried so far as this [permitting libels to go unpunished] in any country--what is meant by the liberty of the press is, that *there should be no antecedent restraint upon it*; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual. With regard to attacks upon the public, the mode of proceeding is by a prosecution. . . . It must be tried where it was published, if the indictment is for publishing; and it must be tried likewise by a jury of that State. Statement at Pennsylvania ratifying convention, Pennsylvania and the Federal

Constitution: 1787-1788 at 308-09 (John Bach McMaster & Frederick D. Stone eds., Da Capo Press 1970) (1888) (emphasis added).

When Justice Joseph Story described the scope of liberty of the press protected by the First Amendment, he similarly condemned "previous restraints," whether coming from a licensor or a judge: "The liberty of the press, as understood by all England, is the right to publish *without any previous restraint, or license; so that neither the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those which are printed.*" 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1878-79, at 735-37 (1833).

Thus, the California court in the instant case was incorrect when it asserted that the prior restraint doctrine is concerned only with ensuring an adequate determination by a judge ("[T]he special vice of a prior restraint is that it suppresses communication before there has been an adequate determination that the speech is unprotected under the First Amendment. Once there has been a final adjudication on the merits that the speech is unprotected, an injunction restraining that speech does not constitute an

impermissible prior restraint." J.A. 57) As in England, the framers of the First Amendment understood that freedom of expression requires that judges, no less than executive branch censors, may not take notice of writings intended for the press.

B. Lessons of the Alien and Sedition Act

The understanding that no government official, judicial or otherwise, may be permitted to restrict the press prior to publication was one of the few topics on which opponents and supporters of the Alien and Sedition Act, *The Sedition Act of 1798*, ch. 74, 1 Stat. 596 (1798), could agree.

Supporters of the Act, which made it a crime to write "any false, scandalous and malicious" statements against either the President or Congress, argued that the law was constitutional because it did not involve a prior restraint, but merely penalized speech after it had occurred:

> The liberty of the press consists not in a license for every man to publish what he pleases without being liable to punishment, if he should abuse this license to the injury of others, but in a permission to publish, without previous restraint, whatever he may think proper, being answerable to the public and individuals, for any abuse of this permission to their prejudice. 5 Annals Of Cong. 2987-2990,

3003-14 (1799).

John Marshall also defended the Sedition Act in his Report on the Minority on the Virginia Resolutions, as being consistent with the First Amendment because it did not impose a prior restraint. "It is known to all," he wrote, that those who publish libels or who "libel the government of the state," may "be both sued and indicted." However, he added:

> The liberty of the press is a term which has a definite and appropriate signification, completely understood. It signifies a liberty to publish, *free from previous restraint*, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community. *See* John Marshall, *Report of the Minority on the Virginia Resolutions*, J. House of Delegates (Va.) 6:93-95 (Jan. 22, 1799), *reprinted in* 5 The Founders' Constitution 136-38 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

The opponents of the Sedition Act did not disagree with the contention that prior restraints were prohibited under the First Amendment. They instead argued that protection against prior restraints was a necessary, but insufficient, condition to guarantee freedom of expression. James Madison argued that freedom of the press included not only a ban on prior restraints, but much more as

well:

> This security of the freedom of the press requires that it should be exempt *not only from previous restraint* by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws. James Madison, *The Virginia Report of 1799-1800, Touching the Alien and Sedition Laws, reprinted in* 5 The Founders' Constitution 135 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

The most significant lesson from the Sedition Act may have been that the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), requires protection for discussion of public issues from subsequent punishment. As James Madison noted, though, such protection was needed in addition to freedom from prior restraint. Both are necessary for the preservation of free expression.

C. Early Judicial Recognition That Injunctions Against Defamation Constitute An Impermissible Prior Restraints

After the end of the Sedition Act, prosecutions for seditious libel ceased to be a serious threat to Nineteenth Century freedom of expression. While common law libel actions were often

successful, state court judges throughout the country recognized the fundamental connection between the traditional rule that courts may not enjoin libels and the doctrine of prior restraints.

The first state court decision to recognize explicitly the link between injunctions on libel and prior restraints was the 1839 New York case of *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (N.Y. 1839). The seller of "Brandreth's Vegetable Universal Pills," had sought to enjoin publication of a made-up "autobiography." The court dismissed the complaint, stating that it could not assume jurisdiction "without infringing upon liberty of the press." *Id.* Chancellor Walworth's opinion stressed that for a court to enjoin a publication would mark a dangerous return to the days of the Star Chamber:

> The court of star chamber in England, once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. *Id.* at 24.

Chancellor Walworth then stated that, since the end of the Star Chamber, only one court "either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or

restrain the publication of a libel, as such, in anticipation." *Id.* at 26. He added with evident satisfaction that "the house of commons, however, considered this extraordinary exercise of power on the part of [Lord Chief Justice William] Scroggs as a proper subject of impeachment." *Id.*

In 1876, the Missouri Court of Appeals denied an insurance company's request to enjoin a libel, stating that such an injunction would violate Missouri's constitutional guarantee of free speech. *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173 (1876). The court held that even if the insolvency of the defendant meant that there was no adequate remedy at law, the constitutional guarantee forbade injunctions against speech:

> It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. *Id.* at 176.

The court concluded by explaining that a judicially imposed injunction was the equivalent of the censor's licensing power as a forbidden prior restraint on speech: "The sovereign power has forbidden *any instrumentality of the government* it has

instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse." *Id.* at 180 (emphasis added).

One year after the Missouri decision, the New York Court of Common Pleas agreed that a temporary injunction against an alleged libel would violate the state's constitutional guarantee of free speech. *N.Y. Juvenile Guardian Soc'y v. Roosevelt*, 7 Daly 188 (N.Y. Ct. Common Pleas 1877). The New York Juvenile Guardian Society had sued to enjoin Teddy Roosevelt, a commissioner of the State Board of Charities, from publishing the results of an investigation which found misuse of the charity's funds. The court declared that a court of equity had no power to restrain defamatory publications and linked this rule to freedom of expression:

> The exercise of any such jurisdiction being repugnant to the provision of the Constitution, which declares (art. I, § 8) that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the *abuse* of that right; and that no law shall be passed to restain [sic] or abridge the liberty of speech or of the press. *Id.* at 191.

This principle was reaffirmed by the New York Court of

Appeals in 1902, which stated the enjoining of libels interfered with both freedom of the press and the right to a jury trial. *Marlin Fire Arms Co. v. Shields*, 64 N.E. 163 (N.Y. 1902). The court stated that:

> [Enjoining libels] would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require . . . . *Id.* at 165.

Probably the most extensive discussion of the link between injunctions against defamation and prior restraints in the Nineteenth Century, came from an 1882 decision of the Louisiana Supreme Court in *State ex rel. Liversey v. Judge of Civil District Court*, 34 La. Ann. 741 (La. 1882). In that case, W. Van Benthuysen obtained an injunction against a newspaper, *The Mascot*, ordering it not to publish libelous cartoons against him. When the paper published more cartoons, its publisher was held in contempt. The Louisiana Supreme Court struck down the injunction as violative of freedom of the press.

The Louisiana Supreme Court began by stating that even though the language of its constitutional guarantee that "no law

shall be passed abridging the freedom of the press" differed in language from the U.S. Constitution, "they all signify the same thing, and convey the general idea which is crystallized in the common phrase, 'liberty of the press.'" *Id.* at 743. The court stated that an injunction for libel would conflict with the principle that "every person may freely publish what he sees fit, and any judgment of the law upon it shall be reserved till afterwards." *Id.*

The court noted the difficulty in ascertaining whether particular statements were defamatory or not, and whether or not they were privileged. Because of this lack of certainty, "there would be no safe course, except to take the opinion of the judge beforehand, or to abstain entirely from alluding to the plaintiff. What more complete censorship could be established?" *Id.* at 745. The court concluded that such a scheme would have a devastating effect on freedom of the press: "Under the operation of such a law, with a subservient or corrupt judiciary, the press might be completely muzzled, and its just influence upon public opinion entirely paralyzed." *Id.*

Similarly, two Texas state courts' injunctions against defamatory statements were also found to violate that state's

constitutional protection for freedom of expression. In a 1909 case, *Mitchell v. Grand Lodge, Free & Accepted Masons of Texas*, 121 S.W. 178,179 (Tex. Civ. App. 1909), the court ruled that the state's "constitutional guaranty of liberty of speech furnishes an additional reason for the application in Texas of the general rule that an injunction will not issue to restrain the publication of a libel." In 1923, another Texas court agreed, stating that the purpose of that constitutional provision "is to preserve the liberty of speech . . . and to inhibit a court of equity from supervising one person's opinion of another or from dictating what one person may say of another...." *Strang v. Biggers*, 252 S.W. 826, 826 (Tex. Civ. App. 1923).

The Alabama constitutional guarantee of freedom of the press was similarly held to bar injunctions against defamation. In 1909, a federal court held that the Alabama state constitution forbade enjoining a libel defaming the plaintiff's credit and business standing:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people, by their organic law, have declared it is better to pay, than to encounter the evils which might result if the court were

allowed to take the alleged slanderer or libeler by the throat, in advance. *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 F. 553, 556 (C.C.M.D. Ala. 1909).

Eight years later, another federal court in Alabama refused to enjoin a defamatory attack on the maker of an alcohol-laced medicine, stating that, "it is not within the authority of any court, or of any other governmental agency, by any sort of censorship to abridge the right belonging to every man to freely speak and publish his sentiments." *Willis v. O'Connell*, 231 F. 1004, 1010 (S.D. Ala. 1916).

Similar holdings were reached by other federal courts. In a 1900 case from Oregon, an injunction for a libel was denied: "The court cannot assume to supervise the publication of offending newspapers, or otherwise constitute itself a press censor." *Balliet v. Cassidy*, 104 F. 704, 706 (C.C.D.Or. 1900). In a 1907 case interpreting South Dakota's constitutional right to free expression, the court concluded that, "in the jurisprudence of the United States there is no remedy for the abuse of this right . . . except an action at law for damages or a criminal proceeding by indictment or

information." *Montgomery Ward & Co. v. S.D. Retail Merchs.' & Hardware Dealers' Ass'n.*, 150 F. 413, 418 (C.C.D. S.D. 1907) (citations omitted).

In 1916, the Nebraska Supreme Court joined the list of courts which explicitly linked the equitable ban on enjoining defamations with the constitutional prohibition on prior restraints. The court, in refusing to enjoin publication of a false statement that a candidate was not actually running for Governor, declared: "The power to exercise a censorship over political publications, as formerly practiced, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government." *Howell v. Bee Pub. Co.*, 158 N.W. 358, 359 (Neb. 1916).

These cases prove, that from the very beginning of the Republic, American courts have understood that permitting libels to be enjoined gave judges the same censorial control over

prospective speech as had been wielded by licensors of old.[2] There was wide-spread agreement that an injunction against pure speech was an impermissible prior restraint.

This consensus was reflected in this Court's landmark 1931 decision, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), which struck down, as a prior restraint, a Minnesota law which permitted the State to obtain a court order abating defamatory newspapers as a nuisance. Noting that the "object and effect" of the statute was to "suppress" future publication, the Court

[2]Some judges, such as Supreme Court Justice Bradley, sitting on circuit in *Kidd v. Horry*, 28 F. 773, 776 (E.D. Pa. 1886), tied the ban on enjoining defamations to the constitutional requirement of a jury trial. Most judges, however, just cited the rule that equity will not enjoin a libel. *See, e.g., Francis v. Flinn*, 118 U.S. 385 (1886); *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963 (7th Cir. 1927); *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982 (C.C.W.D. Mo. 1912); *Edison v. Thomas A. Edison, Jr. Chem. Co.*, 128 F. 1013 (C.C.D. Del. 1904); *Computing Scale Co. v. Nat'l Computing Scale Co.*, 79 F. 962 (C.C.N.D. Ohio 1897); *Baltimore Car-Wheel Co. v. Bemis*, 29 F. 95 (C.C..D. Mass. 1886); *Donaldson v. Wright*, 7 App. D.C. 45 (1895); *Singer Mfg. Co. v. Domestic Sewing Mach. Co.*, 49 Ga. 70 (1873); *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558 (1899); *Everett Piano Co. v. Bent*, 60 Ill. App. 372 (1895); *Raymond v. Russell*, 9 N.E. 544 (Mass. 1887); *Whitehead v. Kitson*, 119, Mass. 484 (1876); *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *Flint v. Hutchinson Smoke Burner Co.*, 19 S.W. 804 (Mo. 1892); *Mayer v. Journeymen Stone-Cutters' Ass'n*, 20 A. 492 (N.J. Ch. 1890); *Owen v. Partridge*, 82 N.Y.S. 248 (Sup. Ct. 1903); *Mauger v. Dick*, 55 How. Pr. 132 (N.Y. Sup. Ct. 1878). One such court ruled that the equity rule was not based on constitutional reasons and could be changed by statute. *See Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673 (8th Cir. 1926). A small minority of courts actually ruled that libels could be enjoined. *See Warren Featherbone Co. v. Landauer*, 151 F. 130 (C.C.E.D. Wis. 1903); *Emack v. Kane*, 34 F. 46 (C.C.N.D. Ill. 1888); *see also Palmer v. Travers*, 20 F. 501 (C.C.S.D.N.Y. 1884) (permitting injunction for libel if defendant threatens repetition).

described the operation of the statute as putting "the publisher under an effective censorship." *Id.* at 712. The primary offending feature of the statute, according to the Court, was that upon a finding that a publisher had distributed a "malicious, scandalous and defamatory" newspaper, the "resumption of publication is punishable as a contempt of court by fine or imprisonment." *Id.* The court's injunction, "would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication." *Id.* at 712. Whether future publications would be free from punishment would depend upon whether the publisher was able "to satisfy the judge that the charges are true and are published with good motives and for justifiable ends." *Id.* at 713. This, explained the Court, "is of the essence of censorship." *Id.*

The strength of the *Near* decision is the historical accuracy and practical relevance of its holding that an injunction against expression should be viewed as an unconstitutional prior restraint. The fact that a judge's order directed against the future communication of a particular speaker would have the same debilitating effect on free communication as the censorship of the

Star Chamber's licensors had long been recognized in England and America, in numerous court decisions, and by treatise writers. *Near* was a declaration that such an infringement on free expression would not be permitted under the First Amendment.

III.

THE CONTINUING NEED FOR THE PRIOR RESTRAINT DOCTRINE

This Court properly has held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. History teaches more than the fact that prior restraints in general, and injunctions for defamation actions in particular, violate the First Amendment. History also reveals the multiple reasons why this rule has persisted for more than two centuries. *See generally* Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 Mercer L. Rev. 1087, 1135- 1145 (2001).

A. Restraining The Censor

One of the concerns with both licensing schemes and

injunctions is the ease with which the censorial decision can be made, enabling an overly enthusiastic or biased decision-maker to go unchecked. As Professor Thomas Emerson wrote, "A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment-the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraints, he can reach the result by a simple stroke of the pen." Thomas Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 657 (1955).

Prior restraints do pose a unique danger regarding both ease of issuance and governmental bias. This danger is best understood by reference to separation of powers principles. Government officials from any branch are always capable of feeling biased against a particular speaker, and any law, be it prior restraint or subsequent punishment, infringes freedom of speech when it permits officials to act on their biases. The genius behind separating powers, though, is that more than one official must feel this bias before a speaker is penalized. It is possible that all three branches of government will want to silence a particular point of

view and no system of government could prevent this occurrence. Fortunately, these moments are far rarer than the cases of the petty tyrant, the angry city council, or the prejudiced judge. Requiring more than one branch to act is not a perfect safeguard, but it is a significant one.

B. Personalization And Equal Protection

A related harm from prior restraints is the personalized nature of the governmental action. Not only does this increase the likelihood of self-censorship, but it permits encroachments on equal protection principles.

Unlike subsequent punishments, which begin with laws or regulations applicable to all potential speakers, prior restraints, whether by license or injunction, identify the individual speaker prior to the speech. The personalization inherent in any system of prior restraints gives the government the ability to violate the equal protection norm inherent in the First Amendment. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). *See generally* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1976). Subsequent

punishments can be imposed based only on violations of laws of general applicability. Prior restraints, whether by judges imposing injunctions or licensors, by contrast, can be imposed specifically on disfavored individuals. Such procedures create the potential for unprovable suppression of unfavorable expression.

C. The Collateral Bar Rule And The Cost of Delay

One of the most pernicious features of injunctions against speech is the collateral bar rule. Unlike a law, which can be violated and still be challenged as unconstitutional, an unconstitutional injunction must be obeyed until overturned by an appellate court: "Persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980); *Walker v. City of Birmingham*, 388 U.S. 307, 317-21 (1967).

Under the collateral bar rule, an improper injunction against speech will have one of two immediate results: either it will be obeyed, and protected speech will be silenced during the

time of appeal, or it will be violated, and the speaker will be punished for uttering protected speech. This problem was summarized by Alexander Bickel with the aphorism, "where a criminal statute chills, prior restraint freezes." Alexander Bickel, The Morality of Consent 61 (1975).

D. Abstract Facts And Speculative Harms

To Professor Blasi, one of the most harmful aspects of a prior restraint is that it necessitates "adjudication in the abstract." Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 49 (1981). One aspect of the speculation problem is that the judge or licensor often must speculate over what the speaker will actually say. As the Court has noted, "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

By contrast, subsequent punishments can be imposed only after the speech is communicated. Not only does this allow a far

more accurate assessment of whether the speech was truly dangerous, it permits the public to protect the speaker who was truly effective. As has been true since colonial times, when the Government seeks to punish the most effective speakers, it runs the risk that the people will see this as punishment for eloquence, not criminality.

E. Aesthetics And Prior Restraints

Another problem with prior restraint is less in its direct impact on speech than in what might be called its aesthetic harm. The principle that a free government should not stop its citizens from expressing their opinions is a core value for Americans. To permit such restrictions, in the words of one commentator, would be to miss "the music of the First Amendment and of the doctrine against prior restraint." Steven Helle, *Prior Restraint By the Backdoor: Conditional Rights*, 39 Vill. L. Rev. 817, 874 (1994).

Professor Emerson described this problem in almost spiritual terms. He wrote that a system of prior restraint "implies a ... willingness to conform to official opinion and a sluggishness or timidity in asserting rights that bodes ill for a spirited and healthy

expression of unorthodox and unaccepted opinion." Thomas Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. at 659.

Professor Blasi similarly asserted that a philosophy permitting prior restraints was based on unacceptable premises. Prior restraints, for example, imply "that the activity of disseminating controversial communications is abnormally hazardous or disruptive, and hence represents a threat to, rather than an integral feature of, the social order." Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. at 85. Additionally, "to trust the censor more than the audience is to alter the relationship between the state and citizen that is central to the philosophy of limited government." *Id.* at 73.

F. The Framers' Intent And The Benefits Of An Easy Case

Finally, because the protection against prior restraint is not merely essential for free expression but was so understood by the framers of the Constitution, the prior restraint doctrine has the effect of producing easy cases for hard times.

First Amendment cases can be difficult for a variety of reasons. Sometimes, a new means of communication presents novel problems that have not been previously addressed. Other times, there will be disagreement over the value of specific expression or the importance of competing values threatened by the expression. Additional problems arise with new approaches either of regulating speech or of dealing with the noncommunicative aspect of expressive conduct.

But issues of prior restraints are simple. As this Court has stated, "When we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 584 n.6 (1983). We can declare with confidence that prior restraints would have deeply offended the Framers and that one of the major objectives of the First Amendment was "to prevent all such previous restraints upon publications as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

What this confidence provides is the rare potential for an

easy case. Speakers, lawyers, and judges can all know it is fundamentally un-American to judge speech before it is given, whether by discretionary license or injunction.

The temptation to regulate opposition speech can strike any government. In turbulent times, the desire to suppress can combine with the legitimate interest in preserving the peace to induce those with power to attempt to silence potentially offending speech. A clear, understandable prior restraint doctrine, with its impeccable historical lineage and simple directive that government officials must permit speech to be communicated, will both deter attempts to impose censorship and permit courts to halt, quickly and efficiently, any such attempt before it works its irremediable harm.

CONCLUSION

The injunction imposed against Ulysses Tory conflicts with centuries of American and English legal practice and of centuries of understanding about the essential nature of freedom of speech and of the press. The judgment of the California Court of Appeals should be reversed.

Respectfully submitted,

Michael I. Meyerson,
Counsel of Record
University of Baltimore School of Law
1420 N. Charles Street
Baltimore, MD 21201
(410) 837-4550

APPENDIX

Alfred L. Brophy is Professor of Law at the University of Alabama, where he teaches in the areas of remedies and history of law. He is also associate editor of the *Law and History Review*. He is the author of Reconstructing the Dreamland: The Tulsa Riot of 1921--Race, Reparations, Reconciliation (Oxford University Press, 2002), as well as articles and essays on legal history and remedies in such journals as the *Boston University Law Review*, *Columbia Law Review,* and *Texas Law Review*. He holds a J.D. from Columbia University and a Ph.D. in the History of American Civilization from Harvard University.

Paul Finkelman is the Chapman Distinguished Professor of Law at the University of Tulsa College of Law, where he teaches legal history and constitutional law. He has authored, co-authored, edited, or co-edited over twenty books and written more than fifty law review articles. He is the co-author of the second edition of A March of Liberty: A Constitutional History of the United States (2 vols. Oxford, 2001), co-author of American Legal History: Cases and Materials (3rd ed., Oxford, 1996), and editor of Religion and American Law: An Encyclopedia (Garland, 2000). He is also a life member of the American Society for Legal History, the Organization of American Historians (OAH), and the Southern Historical Association.

Kermit L. Hall is President of Utah State University and Professor of History. President Hall has published widely in American constitutional and legal history, including The Politics of Justice: Federal Judicial Selection in the Second American Party System (Nebraska, 1979) and The Magic Mirror: Law in American History (Oxford, 1989). He has edited or co-edited fourteen other books, including The Oxford Guide to Supreme Court Decisions (1999), and, the Oxford Companion to the Supreme Court of the United States (1992), He also has served as the editor-in-chief of The Oxford Companion to American Law (2002).

Michael I. Meyerson is Professor of Law and Piper & Marbury Faculty Fellow at the University of Baltimore School of Law where he teaches American Legal History and Constitutional Law. He has written two articles on the history of the prior restraint doctrine, which appeared in the *Indiana Law Review* and *Mercer Law Review*. He has also written a book on constitutional theory, Political Numeracy: Mathematical Perspectives on Our Chaotic Constitution (W.W.Norton 2002), and articles which have appeared in *Constitutional Commentary*, *Georgia Law Review*, *Notre Dame Law Review*, *University of Miami Law Review*, and *Washington & Lee Law Review*.

Stephen A. Siegel is Distinguished Research Professor and Associate Dean for Research and Scholarship at the DePaul University College of Law. He has written extensively in American legal history, with a specialty in constitutional law and jurisprudence. Among his writings are *Historism in Late Nineteenth Century Constitutional Thought*, 1990 Wis. L. Rev. 1431, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1 (1991), and *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Florida Law Review 542 (2004).